Filed 4/21/15 P. v. Gonzales CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JASON XAVIER GONZALES, Defendant and Appellant.	G049919 (Super. Ct. No. FSB060061) O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, J. David Mazurek, Judge. Affirmed in part, reversed in part.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Brendon W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Jason Xavier Gonzales of first degree murder (Pen. Code,[1] §§ 187, subd. (a), 189; count one), assault with a firearm (§ 245, subd. (a)(2); count two), making a terrorist threat (§ 422; count three), and intimidating a witness (§ 136.1, subd. (c)(1); count four). The jury found true firearm use allegations and gang allegations in connection with all four counts. The jury also found defendant served four separate prior terms in state prison. (§ 667.5, subd. (b).) The court imposed 25 years to life on count one, a consecutive term of 25 years to life for discharging a firearm causing bodily injury in the course of the murder, a consecutive term of four years to life for intimidating a witness, a consecutive 10 years on the firearm use attached to that count, and four consecutive one-year terms on each of the state prison prior enhancements. The court stayed the sentences imposed on counts two and three pursuant to section 654. In addition to restitution fines, the court ordered defendant to pay $500 in appointed counsel fees and $505 for the cost of preparing the sentencing report.

Defendant claims he was denied due process by being convicted of an offense not supported by the evidence at the preliminary examination and by erroneous evidentiary rulings, he was denied due process and the effective assistance of counsel when the court denied his motion for a new trial, the court prejudicially erred when it permitted evidence of defendant's postoffense possession of a firearm not used in the commission of the charged offenses, the court imposed two one-year enhancements under section 667.5, subdivision (b) for prior prison terms that were not served separately, and he was denied due process when the court ordered him to reimburse the county for the cost of appointed counsel and the preparation of the probation sentencing report without determining whether he had the ability to pay. We reverse the gang enhancement found in connection with the murder because the court lacked jurisdiction to authorize the

[1] All undesignated statutory references are to the Penal Code.

amendment of the information to include a conduct based enhancement offense not supported by the evidence at the preliminary examination. We further conclude one of the section 667.5, subdivision (b) enhancements must be vacated. We otherwise affirm the judgment.

I

FACTS

The Murder

Rhonda Santellanez, the mother of Nicholas Montag's son, lived with Montag at his mother's house in Highland, California in 2007. Montag, Santellanez, and their son were home at approximately 3:00 p.m. when there was a knock at the door. Montag answered the door. Thomas Rodriguez, someone Montag knew and who had been to Montag's residence "lots of times," was at the door. Montag saw defendant, whom he had never met before, getting out of a car in front of the house. Rodriguez introduced defendant as "Lucky." Rodriguez said defendant had a computer that would not turn on. The three went to the dining room. At some point, Santellanez came from the back of the house. She and Rodriguez said hello to each other. Santellanez then returned to the back of the house to her son.

About 10 or 15 minutes later, there was another knock at the door. It was Albert Mulligan, who defendant knew as "Spider." Defendant had known Mulligan for a couple months at that time. Mulligan entered and said hello to Rodriguez and defendant. Montag said Mulligan seemed to know defendant. One of the visitors brought beer, but Montag did not remember which visitor. Defendant, Mulligan, and Rodriguez were all members of the North Side Redlands gang.

Montag worked on the computer. At one point, the three visitors went outside to smoke cigarettes. Montag joined them. When Montag finished, he went back to work on the computer. Twenty to 30 minutes later, Rodriguez and defendant went back outside. At that point, Mulligan was asleep on the couch.

Montag felt uncomfortable about defendant being in the house because defendant asked questions about Santellanez. Montag attempted to get the visitors to leave by telling them his mother was due home soon. Rodriguez got up and tried to wake up Mulligan. Defendant and Montag tried as well. Rodriguez gave up and went outside. As Montag continued to attempt to wake up Mulligan, defendant walked down the hallway to the back of the house. Montag thought defendant was walking to the bathroom. Less than a minute later, Montag heard a gunshot.

Montag started to run into the living room and saw Mulligan jump up from the couch and defendant returning down the hallway. Defendant had a gun in his right hand, down by his side. Montag moved halfway into the kitchen. Defendant raised the gun and pointed it in Montag's direction. Mulligan jumped in front of defendant, put up a hand, and said, "He's cool. He's cool." Defendant told Montag he would be back and hurt Montag and his family if Montag told anyone or spoke to the police. He then told Montage to "[c]lean up this mess," and ran out of the house.

Montag ran into the back bedroom. Santellanez was on the bed. He pulled her up into a sitting position. She had a gunshot wound to the middle of her forehead. Montag called 911.

When the police responded, Montag did not say who the killer was because he was afraid for his family. Later that day, Montag told police the shooter said he would come back and kill Montag and his family if Montag talked to the police. Montag eventually gave the police Rodriguez's name, but not Mulligan's. He did not give Mulligan's name because Mulligan had saved him and he was afraid the police would find out about defendant from Mulligan.

Santellanez died of the gunshot wound between her eyebrows. A .45-caliber bullet was recovered from her body.

Defendant's Arrest

The police arrested defendant approximately two months later. He had changed his appearance in the interim. On the afternoon of his arrest, Joyce Klein was taking a nap on her couch when defendant entered her residence and told her to hide him. He repeatedly asked her if she heard the helicopter. When she got up, they both saw members of the SWAT team enter her yard. Defendant ran toward the back door and Klein ran out her front door. She told the police defendant was in her house. It took over an hour for the police to get defendant to come out of the house. The police showed Klein some property they found inside her residence, including a knife, a cell phone with the number "13" on it, a pack of Marlboro cigarettes, a sim card broken in two, a gun with the number "187" on it, and an ammunition clip and bullets for the gun. The items were not hers.

Thomas Rodriguez

Although Rodriguez was uncooperative in testifying, denied making a number of the statements in his recorded interview, and appeared to have a selective memory, the following facts are supported by the record. Almost two years after the murder, police interviewed Rodriguez at his request. Rodriguez had contact with defendant when they were in custody after the murder and thought defendant wanted him dead. Defendant wanted Rodriguez to say he was outside with defendant when the shooting occurred.

When first placed in custody, Rodriguez was approached by someone who said defendant wanted money placed on his books. On another occasion, defendant told Rodriguez he wanted Rodriguez to put $500 on his books. Every other time, it was someone else who made the demands and each time they told Rodriguez it was what defendant wanted. Rodriguez said he was extorted and beat up in jail. According to

Rodriguez, defendant ran the unit in the jail where Rodriguez was housed. During one attack on Rodriguez, his attacker told him it came from defendant.

At the time of the interview with police, Rodriguez was housed in protective custody and was afraid for his safety. Rodriguez was granted immunity for his statements.

Rodriguez knew Mulligan from when they both were in prison in Tehachapi. They had rented a motel room together on the day of the shooting, and planned on meeting two women. Then Mulligan got a telephone call from defendant who said he needed help with a computer. Defendant went to Rodriguez and Mulligan's motel room. Rodriguez attempted to telephone Montag about the computer, but Montag did not answer. Mulligan and defendant insisted they go to Montag's house. At Montag's residence, Rodriguez explained the issue of the computer.

Rodriguez said he went into the kitchen and got a knife because defendant was showing off his .45-caliber gun. Rodriguez stated he overheard defendant and Mulligan plotting something. It made Rodriguez uncomfortable, so he went outside and smoked a cigarette. Defendant went outside too. Defendant asked Rodriguez what he knew about Santellanez, and told Rodriguez she had to go. Defendant went back inside and Rodriguez heard a gunshot shortly thereafter. Rodriguez saw defendant after the gunshot and thought defendant was going to shoot Montag. He said Mulligan jumped up and saved Montag's life. Mulligan told Rodriguez defendant did not shoot Santellanez. He said defendant just "scared her." Before leaving, Rodriguez heard defendant say there was a mess to clean up.

Rodriguez said defendant told him he had been ordered to kill Santellanez. According to Rodriguez, defendant had a prior conviction for rape and needed to kill

Santellanez when directed to do so by a high-ranking gang member.[2] While defendant was on the cell phone outside of Montag's residence, Rodriguez heard defendant say, "[O]kay, ok, I'll do it, I'll take care of it, I'll handle it."

Gang Evidence

Redlands Police Department's Corporal Chad Mayfield testified as a gang expert. He said the Mexican Mafia is like the CEO of Hispanic street gangs in southern California, including San Bernardino County and the county's jail system. He explained gang structure and taxing (up to a 30 percent tax paid to the Mexican Mafia by Hispanic gangs from the proceeds of illegal activities on the part of the gang). The Mexican Mafia designates individuals from other gangs to "run things when they are not around." The designated individual is someone who has demonstrated loyalty to the Mexican Mafia and is thought to be trustworthy. The designated person is said to be a "key holder," meaning that person is in control of the city on behalf of the Mexican Mafia.

In the jail system, an inmate who is a Mexican Mafia associate is in charge of the jail. Each block or housing unit in the jail is run by a "shot caller" who reports back to the associate in charge of the jail. According to Mayfield, the more one does for the Mexican Mafia, the more one's status rises in the gang. An associate may go from "being in charge of a housing unit to a tier to a block to a geographic location of the institution and then also in charge of the whole facility." A keyholder has the authority to order someone to assault another inmate, pay taxes, or perform various acts for the gang.

The Mexican Mafia looks down on crimes against children and women, but a person with a conviction involving a child or a woman may be able to obtain a "pass."

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[2] Defendant has a prior conviction for unlawful sexual intercourse with an individual under 18 years of age (§ 261.5, subd. (c)), a crime commonly referred to as statutory rape.

A pass may be given in a case where the conviction is for sexual intercourse with a female under 18 years of age, like defendant's conviction. To obtain the pass, the person needs to put in "a lot of work" to clear his name with the Mexican Mafia.

Those who murder for the Mexican Mafia are considered very trusted, obtain more responsibility, and may even obtain a sponsor and become a member of the Mexican Mafia. A "snitch" or "rat" is someone who has cooperated with the police. Killing a snitch or rat results in increased status for the killer.

If a gang member murders a female without authorization, he could be assaulted or killed because the Mexican Mafia considers the killing of innocents bad for business. On the other hand, if the female is a snitch, she is considered a liability and treated no differently from a man.

When an assault has been ordered, the person who commits the assault will sometimes do so without warning. Other times, the person tells the victim who ordered the assault and why.

Mayfield is aware of situations where a gang member has given information to the police and then recants when time comes to testify. He said this occurs when the individual realizes testifying consistent with his earlier statements "could cause them some issues in the gang culture."

Mayfield is familiar with the North Side Redlands gang. At the time of Santellanez's murder, the gang had 150 to 200 active members and associates. Mayfield testified to North Side Redlands's primary criminal activities and about prior qualifying crimes committed by members of the gang. He said Rodriguez was a North Side Redlands gang member or associate at the time of Santellanez's death and Mulligan was an active North Side Redlands gang member. At the time of Santellanez's death, Mulligan was under Jason Cardoza (aka "Criminal"), who held the keys for the City of Redlands and had authority to order the murder of a snitch. Mulligan was in the upper

echelon and influential within the gang, but neither he, Rodriguez, nor defendant had the authority to authorize Santellanez's murder.

Mayfield said defendant was an active gang member in January of 2007. As far as status within the gang goes, defendant was under Cardoza and Mulligan, but above Rodriguez. Defendant was brought into the gang by Mulligan. Defendant's status in the gang "skyrocketed" after Santellanez's murder. He became the keyholder for his tier in the jail. According to Mayfield, defendant's status would not have risen had the murder not been authorized.

Mulligan's status went down after the murder. He ended up in protective custody, indicating "zero status" within the gang. Mulligan was eventually placed in the witness protection program.

Albert Mulligan

Mulligan testified he had been an active member of the North Side Redlands gang for 16 or 17 years, but was no longer active in the gang. According to Mulligan, he was not active in the gang on the date of the murder. He said he had just been discharged from parole and was attempting to start over.

Mulligan brought defendant into the North Side Redlands gang. Defendant was active in the gang and often spoke about doing things for the gang. The more crimes one commits for the gang, the more his status in the gang increases. Defendant told Mulligan he wanted to make a name for himself. Defendant brought kites—writings that may contain orders for gang members to take particular actions—with him from prison.

Mulligan said one of the rules in the gang is not to talk to the police. The consequence of talking to the police is: "[Y]ou get dealt with." This could include being extorted, beaten up, stabbed, shot, or killed. Mulligan has been to prison before and said a person believed to have cooperated with the police would be extorted when he reaches

prison. If payment is not made, the person could be beaten or stabbed. The one who orders retribution is the one holding the keys. When the Mexican Mafia puts a "green light" on someone, "you get dealt with," which could result in murder.

On the day of the killing, Mulligan took some beer with him to Montag's house. Mulligan went to meet defendant and Rodriguez there and to have Montag check the computer. When Mulligan went inside, defendant and Rodriguez were already there and defendant was on the telephone with someone. Mulligan and defendant went outside to smoke cigarettes and talk. Defendant said he had some kites to deliver and he wanted Mulligan to go along. They went back in about 10 minutes later. Mulligan sat on the couch drinking beer and fell asleep about 20 or 30 minutes later.

He awoke to the sound of a gunshot. He saw defendant "coming out of the hallway" and Montag running into the kitchen. Defendant had a gun in his right hand, a .44-caliber or .45-caliber weapon Mulligan had seen him with before. Mulligan told defendant to put the gun away. Defendant approached Montag and, holding the gun under Montag's chin, said, "You know what to do. Make sure to clean up this mess." Mulligan "swatted the gun down" and told defendant to put it away because there was a child present.

Defense Evidence

Two officers dispatched to the scene of the shooting were told by dispatch the shooting was a "drive-by." The search warrant affidavit prepared by Sergeant Jason Acevedo included a statement attributed to Montag. In that statement, Montag is reported as having said he saw defendant and two other suspects enter the bedroom where Santellanez was and then heard a gunshot.

Elias Arzate was in protective custody at the time of trial because he had testified for the district attorney in another murder trial a year earlier. He said he was in the jail's general population in 2008. He was sent to unit one, a four-cell unit, as the

result of a disciplinary action. Each cell housed a single inmate. Toward the end of 2008, Arzate spoke with another inmate, Mulligan. Mulligan asked Arzate where he was normally housed. When Arzate said unit six, Mulligan asked him if he knew defendant. Mulligan used defendant's moniker, "Lucky." Arzate said he did.

Arzate said he spoke with Mulligan about two or three times a day during the 20 days he spent in administrative segregation. Arzate said it sounded to him as if Mulligan hated defendant. Mulligan said he brought defendant into the gang, but defendant was acquiring more power in the neighborhood than him. Mulligan said he and Rodriguez set defendant up to kill Santellanez because she had been working with the police.

II

DISCUSSION

A. *The Gang Enhancement Attached to the Murder*

Although the first amended complaint alleged the remaining counts were committed for the benefit of a street gang within the meaning of section 186.22, subdivision (b)(1), it made no such allegation in connection with the murder charge. Before any evidence was admitted at the preliminary examination, the prosecutor informed the magistrate he intended to present the testimony of Deputy Mike Martinez as a gang expert, but Martinez was involved in a trial in another courtroom. For purposes of the preliminary examination only, the parties stipulated that if Martinez testified, he would testify defendant is a member of the Northside Redlands gang, "that the actions of [defendant] *after* the shooting of the victim, namely the criminal threats against Mr. Montag, the assault with a firearm on Mr. Montag, and any dissuading of the witness, of Mr. Montag, would benefit [defendant] personally within the gang, and the gang itself." (Italics added.)

Like the amended complaint, the information filed in superior court did not contain a section 186.22, subdivision (b)(1) gang allegation in connection with the murder charge. More than five years later, toward the end of the trial, the court permitted the prosecutor to amend to proof, adding the gang allegation to the murder charge.

Section 739 authorizes the district attorney to file an information charging any offense or offenses named in the magistrate's commitment order *or* offenses shown by the evidence in the preliminary examination. Section 1009 prohibits the amendment of an information "to charge an offense not shown by the evidence taken at the preliminary examination." Although sections 739 and 1009 use the term "offense" or "offenses," an enhancement based on the defendant's conduct in connection with a charged offense must also be supported by the evidence at the preliminary examination. (*People v. Superior Court* (*Mendella*) (1983) 33 Cal.3d 754 [great bodily injury enhancement must be supported by evidence at preliminary examination].)

Defendant does not argue he was surprised by the amendment, or that the amendment was untimely. Rather, he argues he was denied due process because the court lacked jurisdiction to permit the amendment to the information. (See *People v. Pitts* (1990) 223 Cal.App.3d 606, 908.) He claims the evidence from the preliminary examination did not support charging him with a gang allegation in connection with the murder charge. We agree.

The only gang evidence introduced at the preliminary examination was the result of the stipulation. The parties stipulated that if Detective Martinez testified, he would testify defendant is a member of the Northside Redlands gang, Mulligan is an active member of the gang, and Rodriguez is an associate of the gang. Additionally, the parties stipulated: "[T]he actions of [defendant] *after* the shooting of the victim, namely the criminal threats against Mr. Montag, the assault with a firearm on Mr. Montag, and any dissuading of the witness, of Mr. Montag, would benefit [defendant] personally within the gang, and the gang itself." (Italics added.)

A criminal street gang is defined in section 186.22. "'[C]riminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

The very limited gang evidence admitted in the preliminary examination did not establish North Side Redlands has as one of its primary activities the commission of one or more of the offenses listed in subdivision (e) of section 186.22. (See § 186.22, subd. (e).) The stipulation did not mention any crime, much less what crimes, if any, constituted North Side Redlands' primary activities. Neither did the evidence at the preliminary examination establish that members of North Side Redlands have a "pattern of criminal gang activity" as required by subdivision (e) of section 186.22. Additionally, the penalty provided in subdivision (b)(1) of section 186.22 applies to "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) The only evidence in support of a gang enhancement allegation expressly applied only to defendant's actions "after" the murder. There simply was no evidence at the preliminary examination to support charging defendant with a gang enhancement in connection the murder. While the superior court has discretion to permit the prosecutor to amend an information to allege any offense (including a conduct based enhancement) "'shown by the evidence taken at the preliminary examination'" (*People v. Hernandez* (1961) 197 Cal.App.2d 25, 31), the court has no such discretion when the amendment is *not* supported by evidence at the preliminary examination. (*Griffith v. Superior Court* (2011) 196 Cal.App.4th 943, 949, citing § 1009.)

Because the evidence from the preliminary examination did not support charging a gang allegation in connection with the murder charge, the court erred in permitting the prosecutor to amend the information to conform to proof after trial. Accordingly, the jury's finding under section 186.22, subdivision (b)(1), that defendant committed the murder for the benefit of a criminal street gang, must be reversed.

Striking the true finding on count one will not, however, result is any diminution of defendant's sentence. The court sentenced defendant to 25 years to life on the first degree murder conviction. Consecutive to that term, the court imposed a 25 years to life term for defendant's intentional discharge of a firearm proximately causing the victim's death. (§ 12022.53, subd. (d).) The court did not impose a penalty under section 186.22, subdivision (b), on the murder conviction. It would have been useless to impose the applicable prescribed penalty—that defendant "not be paroled until a minimum of 15 calendar years have been served" (§ 186.22, subd. (b)(5))—given defendant must serve a minimum of 50 years on the murder and firearm enhancement before he is eligible for parole.

B. *Defendant's Post-Murder Possession of a Firearm*

Defendant was arrested approximately two months after the murder. He was in possession of a .32-caliber handgun marked with the number "187" on it. That weapon was not used to kill Santellanez. She was shot with a .45-caliber handgun. Defendant argues admission of this evidence was inflammatory, cumulative, and denied him due process. He claims he was prejudiced by evidence he possessed a gun when arrested. He reasons that as the parties stipulated the weapon seized was not the murder weapon, evidence of his possession of the weapon two months after the murder did not tend to show he committed the murder, but rather only demonstrated he was the type of person who carries deadly weapons.

Evidence Code section 352 gives the court discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Trial courts have broad discretion to weigh the relevancy of proposed evidence against the potential prejudicial impact of the evidence. (*People v. Lancaster* (2007) 41 Cal.4th 50, 83.) The fact that evidence may be harmful to a party's position is not what the Legislature meant when it used the phrase "undue prejudice" in Evidence Code section 352. "'"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against . . . [one party] as an individual and which has very little effect on the issues."' [Citations.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 178.)

In *People v. Riser* (1956) 47 Cal.2d 566, 573, a killing was done with a .38-caliber Smith and Wesson revolver. When police subsequently arrested the defendant they recovered a .38-caliber Colt and a P38. (*Id*. at p. 577.) The court stated it was permissible to introduce evidence of a weapon in the defendant's possession at the time of his arrest when the weapon "could have been the weapon[] employed" in the killing. (*Ibid.*) The situation is different when the weapon found in the defendant's possession could not have been the murder weapon. "When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*Ibid*.) Given Santellanez was shot with a .45-caliber bullet, it is beyond dispute the .32-caliber handgun found in defendant's possession when arrested was not the murder weapon. *Riser* is not, however, dispositive.

The identity of the killer was not the only issue in the present case. The information also alleged a gang enhancement in connection with a number of the charged offenses. To prove the truth of the allegations, the prosecution had to introduce evidence

the crimes were "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) Defendant's possession of a cell phone case with "13" inscribed on it and his possession of a firearm with "187" inscribed on it were relevant to prove the gang enhancements. The "13" on the cell phone case stands for the 13th letter of the alphabet (M) and is a symbol used by the Mexican Mafia. (See *In re Cabrera* (2012) 55 Cal.4th 683, 689; *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1417; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1544.) Although there was no testimony on the issue, "187" is commonly known by gang members as the Penal Code section for murder. (See *People v. Maciel* (2013) 57 Cal.4th 482, 539; *People v. Valdez* (2012) 55 Cal.4th 82, 138, fn. 36.) It is worth noting murder is also one of the primary activities of the North Side Redlands gang.

There was testimony defendant wanted to make a name for himself in the gang and that his stock in the gang rose following the murder. Unlike the situation in *Riser*, where the weapons found after the defendant was apprehended were not relevant on any issue—and specifically were not relevant on the issue of identity of the murder weapon—the complained of evidence in the present matter was relevant to prove defendant's connection with the gang and to demonstrate his actions on the date of the killing were for the benefit of or at the direction of a criminal street gang, as evidenced by his continued connection with the gang. Moreover, the "187" on his .32-caliber handgun may have served as an admission. (See Evid. Code, § 1220; *People v. Brown* (2014) 59 Cal.4th 86, 103-104.) We cannot, therefore, conclude the trial court abused its discretion in admitting evidence of defendant's possession of this particular handgun at the time of his arrest.

C. *Other Evidentiary Issues*

Rodriguez testified as a prosecution witness, although it does not appear he testified willingly. Prior to trial, Rodriguez spoke to law enforcement about the matter. Because Rodriguez claimed at trial not to remember certain matters or making certain statements, the court admitted evidence of Rodriguez's prior statements to demonstrate he was afraid to testify against defendant. Defendant claims "a mass of inadmissible evidence" was admitted and to the extent any of the evidence was admissible, the trial court prejudicially erred when it denied his request to instruct the jury as to the limited purpose of the admitted evidence. He concedes, however, some of the evidence was admissible to demonstrate Rodriguez was afraid to testify.

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) "'Relevant' evidence, means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court is vested with broad discretion in determining whether evidence is relevant. (*People v. Williams* (2008) 43 Cal.4th 584, 634.) As an appellate court, "we will not disturb the court's exercise of that discretion unless it acted in an arbitrary, capricious or patently absurd manner [citation]." (*People v. Jones* (2013) 57 Cal.4th 899, 947.)

Defendant complains Rodriguez was permitted to testify to matters about which he had no personal knowledge. Other than an expert witness, "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." (Evid. Code, § 702.) "To testify, a witness must have personal knowledge of the subject of the testimony, i.e., 'a present recollection of an impression derived from the exercise of the witness' own senses.' [Citations.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 356.) By admitting the evidence and overruling defendant's

objections, the court impliedly found there was a sufficient foundation for admission of the evidence. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 132.)

Defendant contends the trial court prejudicially erred in permitting Rodriguez to testify (or in admitting his hearsay statements) in number of instances. Prior to trial, defendant gave statements to the police and testified at an ex parte hearing obtained by the prosecution to determine whether it could withhold discovery from defendant pursuant to section 1054.7.[3] The prosecutor sought to introduce a number of Rodriguez's statements from that hearing to impeach Rodriguez's trial testimony.

In one of the complained of instances, Rodriguez said defendant has an association with the Mexican Mafia because defendant runs his "tank" at the jail, so he has contact with whoever is running the jail, presumably someone with the Mexican Mafia. Defense counsel objected the evidence lacked foundation. In another instance defendant's statements involved an individual known as "Torro," who Rodriguez said is a full member of the Mexican Mafia. Defendant's foundation objection was overruled. When Rodriguez was asked a question that purportedly would supply the foundation—"[b]ecause you're familiar with the Mexican Mafia?"—Rodriguez answered, "I've been in jail, so you hear things. I am not familiar but I've been in jail."

There was evidence the Mexican Mafia puts individuals in charge of running the jail, including individual tiers. Given Rodriguez's gang background and his experience in jail, we cannot say the court erred in concluding there was sufficient foundation for Rodriguez to say defendant ran a tank and therefore must have been associated to some extent with the Mexican Mafia, or in admitting evidence that "Torro" is a member of the Mexican Mafia.

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[3] "Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding." (§ 1054.7.)

The next instance involved the following question and answer: "So, since now the Mexican Mafia is involved, your fear is that anybody associated with or working with—working under the Mexican Mafia could take some action for the benefit of [defendant]?" Rodriguez said it was. The lack of an objection forfeited the issue as to this evidence. Moreover, such evidence was relevant to show why defendant was reluctant to testify.

The fourth instance concerned a statement Rodriguez made to police on November 20, 2008. In that statement, Rodriguez said he saw defendant talking on the telephone while at Montag's residence and believed defendant was plotting to kill Santellanez. Again, defendant's foundation objection was overruled, just as the same objection was overruled when the prosecutor asked Rodriguez if he told police defendant got rid of his phone while being chased by the police. Rodriguez admitted telling the police defendant got rid of his cellphone after the murder.

We note that in considering defendant's foundation objections, the court offered to have Rodriguez recalled to the witness stand to cure any foundation that may have been lacking. Had Rodriguez been recalled and testified to what he heard during defendant's telephone call prior to Santellanez being shot, he may have testified he heard and recognized the voice of the person to whom defendant was talking. He may have testified he was with defendant when defendant ran away from the scene and saw defendant dispose of the gun. Or, he may have testified defendant told him he (defendant) disposed of his cell phone while running from the police. Had he done so, a foundation would have been laid for the statements admitted into evidence. Thus, when the court overruled the objection, the ruling was not final and the objection should have been remade when Rodriguez was not recalled to the witness stand. Consequently, the issue has not been preserved for appeal.

We turn now to defendant's limiting instruction issue. "When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court

upon request *shall* restrict the evidence to its proper scope and instruct the jury accordingly." (Evid. Code, § 355, italics added.) The timing of a limiting instruction, however, is within the court's discretion. (*People v. Dennis* (1998) 17 Cal.4th 468, 533-534.) The court declined defense counsel's request to give a limiting instruction during Rodriguez's testimony because the court wanted to assure itself the evidence was relevant *only* for a limited purpose before it gave such an instruction. As it turns out, certain evidence was not only admissible to explain defendant's reluctance to testify, but also as prior inconsistent statements. (See Evid. Code, § 1235 [a prior statement "by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing"].) Defense counsel did not thereafter renew his request for a limiting instruction. The failure to press for a final ruling forfeited the issue. (*People v. Homick* (2012) 55 Cal.4th 816, 871.)

D. *Rodriguez's Request to Speak to Defense Counsel*

After Rodriguez took the witness stand, but before he was asked any questions, he pointed to the defense side of counsel table and asked, "Can I have a minute to talk to—?" Before he was able to finish his question, the bailiff told him to sit down, at which point Rodriguez said, "All right. Then I got nothing to say." The court ordered Rodriguez to answer questions and threatened to hold him in contempt if he did not.

The prosecutor attempted to make it appear as if Rodriguez asked to talk to defendant. When defense counsel corrected the prosecutor and said he thought Rodriguez was pointing to him, Rodriguez agreed. When asked outside the presence of the jury, Rodriguez said he wanted to talk to defense counsel and then the prosecutor. The court permitted Rodriguez to speak with defense counsel off the record. Afterward, defense counsel stated Rodriguez sought his advice, but that he told Rodriguez he was in no position to advise a witness.

Even after Rodriguez made it clear he pointed over to the defense side of counsel table because he wanted to speak to defense counsel, when the jury was back in the courtroom, the prosecutor again attempted to make it appear as if Rodriguez wanted to speak to defendant. Again, Rodriguez made it clear he wanted to speak to an attorney: "Well, I don't have a lawyer, so who do I talk to? I need legal guidance. You're a district attorney. You're not a lawyer. I needed some information. So I seen the lawyer. That's who I wanted to talk to." On cross-examination, Rodriguez explained he wanted to talk to defense counsel because defense counsel was the only person he recognized as an attorney.

In his closing argument, the prosecutor used Rodriguez's effort to speak to defense counsel. "Now, you know, we saw Mr. Rodriguez in court. Clearly he didn't testify truthfully when he was here. He was afraid. In fact, remember in the beginning when I first asked him on simple question, he points toward the defense area and says, 'I need to talk to him'? That's how he starts it off. That's how we start testimony, and then he goes from there. He is terrified."

Defendant contends he was denied due process and the effective assistance of counsel. He argues that if the jury believed defense counsel could or would control the testimony of a prosecution witness, defense counsel's effectiveness would have been "dramatically diminish[ed]," and the effective assistance of counsel is included within the ambit of due process. (See *Strickland v. Washington* (1984) 466 U.S. 668, 684-685.)

It is evident from his testimony Rodriguez had a selective memory. Defense counsel did not fare any better on cross-examination than the prosecutor did on direct. A reasonable jury would not have been left with the impression defense counsel had any control over Rodriguez. Moreover, even without the prosecutor's argument, it was apparent Rodriguez did not want to testify and did not always testify truthfully. The prosecutor's inference that Rodriguez was terrified was fair comment on Rodriguez's

demeanor and conduct on the witness stand. We therefore find the comment did not deny defendant due process or effective assistance of counsel.

E. *State Prison Priors*

Section 667.5, subdivision (b) authorizes the court to impose a one-year consecutive term of prison for each prior separate term the defendant has served in state prison, if he thereafter failed to remain free of prison commitment or a felony conviction within five years of his release. Defendant was found to have served four terms in state prison and the court imposed four consecutive one-year terms under section 667.5, subdivision (b). He contends the court erred in imposing one-year terms for two prior prison terms he served concurrently with each other. The Attorney General concedes the error. We accept the concession.

The court imposed separate one-year terms for prison sentences served on San Bernardino case Nos. FSB19503 and FSB19049. (§ 667.5, subd. (b).) According to the record on appeal, defendant was sentenced to three years state prison on case No. FSB19049 on August 19, 1998, the sentence to be served concurrently with the sentence imposed on case No. FSB19503. That same day, defendant was sentenced on case No. FSB19503 to three years state prison.

It has long been the law in this state that a defendant who has served concurrent terms of imprisonment is deemed to have served but one term in state prison for purposes of section 667.5, subdivision (b). (*People v. Jones* (1998) 63 Cal.App.4th 744, 747.) "A prior separate prison term for the purposes of this section shall mean a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes, including any reimprisonment on revocation of parole which is not accompanied by a new commitment to prison, and including any reimprisonment after an escape from incarceration." (§ 667.5, subd. (g).) "'The plain meaning of section 667.5, subdivision

(g) is to prevent multiple one-year enhancements under section 667.5 itself where the offender has served one period of prison confinement, or block of time, for multiple offenses or convictions.'" (*People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1669.) As defendant served but one term of imprisonment on his concurrent prison commitments in case Nos. FSB19503 and FSB19049, the commitments gave rise to but one state prison term under section 667.5, subdivision (b), not two. Consequently, we vacate the true finding on the section 667.5, subdivision (b) enhancement allegation based on the sentence defendant served on case No. FSB19049. The abstract of judgment must be modified to reflect three one-year enhancements under section 667.5, subdivision (b), not four.

F. *Orders to Pay Attorney Fees and the Cost of Preparing the Sentencing Report*

In addition to imposing the state prison commitment at defendant's sentencing, the court also ordered defendant to reimburse the county $500 toward the cost of supplying him with appointed counsel (§ 987.8), and $505 to reimburse the Probation Department for the cost of preparing the presentencing report (§ 1203.1b), as recommended by the probation report. Defendant argues the court erred in ordering the reimbursements without giving him a hearing and to determine whether he had the ability to pay those amounts, i.e., whether he was indigent.

Although the Attorney General argued defendant forfeited the issue of the order directing reimbursement for the cost of the sentencing report, she initially conceded error in connection with the order directing defendant to reimburse $500 for attorney fees and stated the matter should be remanded for the court to conduct a hearing on whether defendant was indigent or not. After the matter was taken under submission, however, our Supreme Court issued opinions in two cases dealing with these issues. (See *People v. Trujillo* (2015) 60 Cal.4th 850; *People v. Aguilar* (2015) 60 Cal.4th 862.) We vacated submission and directed the parties to each file a supplemental letter brief addressing the

effect, if any, of the recent decisions. We have considered the supplemental briefs submitted by both parties. The Attorney General changed her position and now contends defendant forfeited his right to appeal both orders.

1. *The Relevant Statutes*

a. *Section 987.8*

Subdivision (b) of section 987.8 provides in pertinent part: "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, *after notice and a hearing,* make a determination of the *present ability of the defendant to pay all or a portion of the cost* thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided." (Italics added.)

A defendant's ability to pay is based on his "overall capacity . . . to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her." (§ 987.8, subd. (g)(2).) In making that determination, the court is to consider "[t]he defendant's present financial position." (§ 987.8, subd. (g)(2)(A).) Absent "unusual circumstances," however, "a defendant sentenced to state prison shall be determined *not* to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." (§ 987.8, subd. (g)(2)(B), italics added.)

b. *Section 1203.1b*

"In any case in which a defendant is convicted of an offense and is the subject of any . . . presentence investigation and report, whether or not probation supervision is ordered by the court, . . . *the probation officer*, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in

fines, assessments, and restitution, *shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of* . . . of conducting any presentence investigation and preparing any presentence report made pursuant to Section 1203 . . . . The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that *the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver*. (§ 1203.1b, subd. (a).) In the event the defendant does not waive his right under this subdivision to the trial court's determination of his ability to pay, the probation officer must refer the matter to the court so a hearing on the defendant's ability to pay may be scheduled. (§ 1203.1b, subd. (b).) In determining the ability to pay, the court is to consider the defendant's "[p]resent financial position" (§ 1203.1b, subd. (e)(1)), the defendant's "[r]easonably discernible future financial position" (§ 1203.1b, subd. (e)(2)), and whether the defendant is likely to be employed within a year of the hearing (§ 1203.1b, subd. (e)(3)).

2. *The Recent Supreme Court Decisions*

a. People v. Trujillo

In *People v. Trujillo, supra*, 60 Cal.4th 850, the defendant was convicted of receiving stolen property. (Pen. Code, § subd. (a)) The court placed defendant on probation and ordered defendant *inter alia*, to pay a presentence investigative fee "not to exceed $300" (§ 1203.1b) and to pay the cost of supervision on probation, "not to exceed $110 per month." Defendant did not object to either order. (*People v. Trujillo, supra*, 60 Cal.App. at p. 854.) Like the defendant in the present case, the defendant in Trujillo also

chose not to be interviewed by the probation officer and invoked her right to silence under the Fifth Amendment. (*Id.* at p. 855.)

In *People v. McCullough* (2013) 56 Cal.4th 589, the Supreme Court held the failure to object to the imposition of a booking fee under Government Code section 29550.2, subdivision (a) forfeits the issue on appeal. (*People v. McCullough*, *supra*, 56 Cal.4th at pp. 590, 597.) The defendant in *Trujillo* attempted to distinguish *McCullough*. (*People v. Trujillo*, *supra*, 60 Cal.4th at p. 857.) She pointed out that unlike the Government Code section at issue in *McCullough*, section 1203.1b expressly provides a defendant is entitled to a determination of her ability to pay absent a knowing and intelligent waiver of that right. (*People v. Trujillo*, *supra*, 60 Cal.4th at pp. 857-858.) The Supreme Court rejected the distinction and held "[n]o reason appears why defendant should be permitted to appeal the sentencing court's imposition of such fees after having tacitly assented below." (*Id.* at p. 859.) Because trial counsel is in the best position to know whether the defendant knowingly and intelligently waives his or her right to a hearing, the appellate courts are not "well positioned to review this question in the first instance." (*Id.* at p. 860.)

b. People v. Aguilar

In *People v. Aguilar*, *supra*, 60 Cal.4th 862, decided the same day as *Trujillo*, the question was whether the defendant forfeited the issue of his ability to pay the cost of reimbursing the cost of the sentencing report under section 1203.1b and reimbursing the cost of appointed counsel under section 987.8. (*People v. Aguilar*, *supra*, 60 Cal.4th at p. 864.) On appeal, the defendant in *Aguilar* contended he was not advised of his right to a hearing, he did not waive such right, and the trial court erred in imposing the fees without finding he had the ability to pay. (*Id.* at p. 865.) The court found its decision in *Trujillo* controlling. (*Id.* at p. 866.) Like the defendant in *Aguilar*, we note nothing prevented the defendant from demanding a hearing on the issue of his ability to pay. (*Ibid.*) The *Aguilar* court concluded application of the forfeiture rule was

particularly appropriate because "under the procedures contemplated by sections 987.8 and 1203.1b, defendant had two opportunities to object to the fees the court imposed, and availed himself of neither." (*People v. Aguilar, supra,* 60 Cal.4th at p. 867.) Thus, the court concluded defendant forfeited the issues for appeal. (*Id.* at p. 868.)

3. *Analysis*

We are bound by the decisions in *Trujillo* and *Aguilar*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Defendant attempts to distinguish the present case, but fails. Granted, there is no evidence in the record indicating defendant had the ability to reimburse the cost of preparing the sentencing report or to pay $500 toward reimbursing the expense of appointing counsel to represent him. He was not interviewed by the probation officer who prepared the sentencing report because he declined to be interviewed, and there is nothing in the report from which an ability to pay may be found. This, however, does not impact the determination of whether he should be permitted to raise the issue on appeal without having first raised it in the trial court.

The fact that defendant was not interviewed does not mean he lacked the ability to pay the reimbursements ordered by the court. The rich, as well as the indigent, may refuse to be interviewed by the probation officer. Defendant had the ability to tell the court he could not pay the fees to reimburse the partial cost of appointed counsel or the cost of preparing the sentencing report, and demand a hearing on his ability to pay, but he did not bring the issue to the attention of the court. His only reference to indigence came in connection with a $10,000 restitution fine when he asked the amount of the fine be *reduced* to some unspecified amount due to his indigence. The fact that he (or his counsel) thought he was unable to pay the maximum ($10,000) restitution fine does not demonstrate he was unable to pay the much smaller amounts ordered in connection with the reimbursements.

It may very well be that defendant was in fact indigent and lacked the present ability to pay the ordered amounts, but he forfeited that issue when he failed to

raise it in the trial court. (*People v. Trujillo*, *supra*, 60 Cal.4th at p. 858; *People v. Aguilar*, *supra*, 60 Cal.4th at pp. 868-869.) Had defendant raised the issue below and demanded a hearing on his ability to pay, presumably the court would have held a hearing as required by section 987.8, subdivision (b), and section 1203.1b, subdivision (b). By raising an issue for the first time in this court, defendant frustrated the very reasons courts require issues to be initially raised in the trial court: the trial court was denied the opportunity to correct the error, preventing gamesmanship by attorneys (see *In re Sheena K.* (2007) 40 Cal.4th 875, 881), and possibly saving the time and expense involved in appellate proceedings reviewing an issue that might have been resolved in defendant's favor in the trial court had defendant but raised it.

Defendant points out the *Trujillo* court stated a defendant who has been granted probation and ordered to pay fees despite the lack of a hearing on his ability to pay is not without a remedy and may litigate the issue while on probation. (*People v. Trujillo*, *supra*, 60 Cal.4th at pp. 860-861.) This conciliatory language appears after the court explained why the issue had been forfeited (*id*. at p. 860), and does not appear to have been a factor in determining whether the failure to raise the issue in the trial court forfeited the issue on appeal. Whether defendant was or was not indigent, he forfeited the issue by not requesting a hearing on the issue of his ability to pay the ordered reimbursements in the trial court. (*Id*. at p. 858; *People v. Aguilar*, *supra*, 60 Cal.4th at pp. 868-869.)

III

DISPOSITION

The true finding on the section 186.22, subdivision (b)(1) gang allegation attached to count one is reversed and the punishment imposed and stayed on the allegation is vacated. The true finding on the section 667.5, subdivision (b) enhancement

based on the prison sentence served on case No. FSB19049 is ordered vacated. The clerk of the superior court is directed to issue an amended abstract of judgment to reflect the imposition of three (not four) one-year enhancements under section 667.5, subdivision (b), and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.